

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP MATHIS,

Defendant-Appellant.

UNPUBLISHED

July 25, 1997

No. 187246

Oakland Circuit Court

LC No. 95-137563-FH

Before: Gribbs, P.J., and Holbrook, Jr., and Martlew*, JJ.

MEMORANDUM.

Defendant was convicted by a jury of assault and battery, MCL 750.81; MSA 28.276, malicious destruction of a building over \$100, MCL 750.380; MSA 28.612, and trespass, MCL 750.552; MSA 28.820(1). He thereafter admitted to three prior felony convictions, establishing that he was an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to serve an enhanced prison term of 2 ½ to fifteen years on the malicious destruction conviction and two terms of ninety days for the assault and trespass convictions. He appeals as of right and we affirm.

Defendant was not denied effective assistance of counsel. To establish such a claim, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Here, trial counsel made a reasonable strategic decision to pursue an intoxication defense, and this Court will not second guess matters of trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Accordingly, defendant has not overcome the presumption that trial counsel's performance was objectively reasonable in failing to pursue a defense of necessity.

Neither has defendant shown entitlement to appellate relief because of counsel's failure to object to allegedly inaccurate statements of the prosecutor at sentencing. At the hearing on defendant's motion for a new trial, the court stated that it did not take the prosecutor's remarks into consideration in

* Circuit judge, sitting on the Court of Appeals by assignment.

imposing sentence. Accordingly, defendant was not prejudiced by counsel's failure to object. *Pickens, supra* at 314.

Defendant is not entitled to a remand for resentencing where the trial court mistakenly stated that it was imposing an enhanced sentence for defendant's habitual offender "conviction." To hold otherwise would exalt form over substance. Instead, we exercise our authority under MCR 7.216(A)(1) and amend the judgment of sentence *nunc pro tunc* to reflect that (1) defendant's conviction on Count III, habitual offender, fourth offense, is vacated, and (2) defendant's sentence for Count II, malicious destruction of a building, was enhanced pursuant to MCL 769.13; MSA 28.1085 (as amended), because of defendant's status as an habitual offender, fourth offense; MCL 769.12; MSA 28.1084.

The enhancement of defendant's sentence as an habitual offender was not void where it is apparent from the record that the prosecutor filed an amended notice of intent to seek sentence enhancement listing defendant's 1984 assault conviction. Moreover, defendant admitted to the conviction on the record.

Finally, defendant's prison sentence of 2 1/4 to fifteen years is proportional to the offender and the offense. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Defendant's convictions and sentences are affirmed. The judgment of sentence is amended as directed.

/s/ Roman S. Gribbs
/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey L. Martlew